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Major Alan Serrano

AFJAGS Podcast: Episode 50

The First Amendment in the Military with Major Alan Serrano - Part 1

HOST: MAJOR RICK HANRAHAN

GUEST: MAJOR ALAN SERRANO

Maj Serrano discusses the First Amendment including freedom of speech, assembly and religion within the military.

CAPTAIN CHARLIE HEDDEN:

Hello and welcome to episode 50 of The Air Force Judge Advocate General's School Podcast. This is part one of a two-part episode on the First Amendment. And in today's show, Major Rick Hanrahan interviews Major Alan Serrano about the freedom of speech, assembly and religion within the military. They'll tackle some of the most HOT-Button issues, including the interplay between free speech and the use of social media, how commanders grapple with curtailing certain types of speech, what constitutes an extremist group, and how the military typically handles requests for religious accommodations.

Here are a few clips from the interview.

[short intro background music]

SHOW EXCERPTS & INTRODUCTIONS

MAJOR ALAN SERRANO:

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Social media is kind of this Wild West in a lot of ways, and people forget that they still represent something bigger than themselves, and they've got to keep that in mind and stay on the right side of the rules.

ANNOUNCER:

Welcome to The Air Force Judge Advocate General's Reporter Podcast, where we interview leaders, innovators, and influencers on the law, leadership, and best practices of the day. And now to your host from [The Air Force Judge Advocate General's School](https://www.jagreporter.af.mil/).

MAJOR RICK HANRAHAN:

Welcome to another episode from the Air Force. In today's show, we're going to tackle a topic that gets a lot of press and is a constant draw of discussion, both within the DoD and beyond. We're going to discuss the First Amendment, freedom of speech, and touch upon freedom of association and religion within the military. This is obviously a very large area law so we'll focus on some of those more hot button issues and current events related to the topic. And we have our very own subject matter expert from The JAG School to speak with us today. Major Alan Serrano.

Major Serrano, thank you for coming on the show today.

MAJ SERRANO:

Hey, Rick. Thanks for having me here. Excited to do this. Hopefully everyone will find this enjoyable.

MAJ HANRAHAN:

Major Serrano is currently the Executive Officer to the Commandant at The Judge Advocate General's School here at Maxwell Air Force Base. In this capacity, he assists the commandant in the overall JAG School mission to train and educate more than 23,000 students each year through our myriad of both in residence and online courses to include the judge advocate staffers, along with collaboration in teaching at Squadron Officers, School, Air Command and Staff College and Air War College. And over time, Major Serrano has developed an expertise on First Amendment law where he teaches on this topic to many of these courses throughout the year.

Major Serrano received his commission through the Direct Appointment Program and entered active duty in 2012. He has held various civil law and military justice positions through his career to include as an Assistant Staff Judge Advocate and an Area Defense Counsel at Ramstein Air Base, where I might add that our careers first crossed paths when I was a special victim counsel in Europe, and we worked on multiple justice cases.

With that kind of background, Major Serrano, can you provide a little more background on your bio and what you're currently doing these days?

MAJ SERRANO:

All right. So my background, yeah, as Major Hanrahan said, those kind of my career highlights there before I came to The JAG School. I went to my undergrad and law school at University of California at Davis, where notably, I guess I TA'd as a law student for the undergrad program, for First Amendment classes, for the undergrad program there and Commonwealth stuff.

Since coming into the military, I've been stationed at Langley Air Force Base, I was overseas in Germany for three and a half years, now being at The JAG School for three years. And my next duty assignment will be to go to Buckley in Colorado. And I will be there as the Deputy Staff Judge Advocate in the legal office.

FIRST AMENDMENT LAW OVERVIEW**MAJ HANRAHAN:**

Great stuff there. I'm excited for you. And I know we're both going on to deputy positions after this, so we will probably cross paths again in the future, which will be great. So today's topic is a very large one. I know it's one that gets a lot of attention both within the media and within the JAG Corps and really the DoD at large. So could you maybe offer just a brief overview on First Amendment law? Just just kind of highlights maybe some history and some of the seminal cases.

MAJ SERRANO:

Yeah. So that's a good place to start for First Amendment in the military. I think a lot of people joining, recognize that when they come into the military, certain constitutional rights that we have, might take a backseat during our military careers. And so for the First Amendment, the first thing to really keep in mind is that when you come into the military, you do maintain your constitutional rights—things like your right to be free from unreasonable searches and seizures. We have all

that built into our military justice codes. You don't give up your constitutional rights just because you joined.

However, in the First Amendment, there are some limitations that people need to be aware of. The first thing is to know historically that the Supreme Court in several different cases, but most notably starting with *Schenck versus United States*, which is a 1919 case, has signaled and Congress has signaled that in times of war and when speech may jeopardize the ability of the United States to successfully prosecute a war or recruit or enlist members to help the war effort they're going to, they've shown historically an interest in potentially limiting First Amendment expression when it might jeopardize those war efforts.

And so the *Schenck* case is a very famous case where they first did that. They restricted recruit—there was an individual who wanted to interfere with recruiting, enlistment into the World War One war effort. And the court upheld his conviction of the Espionage Act. And this case is famous for several things, but notably, coming out of that case was this kind of doctrine that when it comes to military warfare in the United States, speech might be restricted, even for civilians.

And also the clear and present danger test, which we all have heard of, which is no longer the current test for certain type of inappropriate speech. But it was a famous case and a famous doctrine, as well as the line that you cannot shout fire in a theater if it's false. And that's a famous uh, it's kind of an adlib, but that's from a quote from Justice Holmes in that case. That's kind of where we start with the First Amendment. So we know that when it comes to war fighting our First Amendment rights are, can be limited.

For military members specifically, the other big case, I think, to keep in mind is *Parker versus Levy*. *Parker versus Levy* is a case that came out of the United States Supreme Court in 1974 that really established a limit to free speech in the U.S. military. And it kind of establishes this quasi-military necessity doctrine so that ultimately

when we see that a military member's speech may impact or interfere with military operations.

FREEDOM OF SPEECH

MAJ HANRAHAN:

Thank you for that to kind of help us hone in a little bit on this. So I know there's lots of things going on in current events today in all kinds of issues, Black Lives Matter, all types of things that we're going to get into here. But one of the areas I'd like to start off with is just kind of the freedom of speech maybe, what you touched on a little bit, between military and civilians that work within the government.

MAJ SERRANO:

So yeah, that's a that's a great question. So for another thing to keep in mind when it comes to the military is under a case called *Greer versus Spock*, which is a Supreme Court case from 1976, we have to keep in mind that where we stand affects our speech rights. So a civilian who is standing on a public street corner, just anywhere in the United States, they generally are considered to be in the public forum. So their speech protections are very high. To have the government restrict their speech, the government must meet the strict scrutiny standard established by the Supreme Court. So the government has to have a compelling interest and the restriction must be narrowly tailored. And that means that an individual can have speech that might be offensive to the government in that public forum, and they will not be silenced unless the government has a really high justification.

Now, the difference for military members and the civilians we work with is that once you come onto a military installation, we have generally been considered a nonpublic forum and that *Greer versus Spock* case talks about this. That case involved political speech on an installation during a presidential election where members wanted to handout leaflets and things like that to military members on an installation and the commander of the installation said, "No." That was upheld because as a, when you come on to the installation, as

a nonpublic forum, we don't have to meet that strict scrutiny test to restrict certain speech, and we just have to have an analysis from the courts, I will say that.

Some of it requires a little bit of interpretation, but really this doctrine of kind of this military necessity, do we have some legitimate military interests in restricting speech, either for personnel or for people on an installation? Generally, the courts are deferential to the command if they do restrict speech, so long as it's tied to a legitimate military interest. And those are going to be the traditional ones, like maintaining good or discipline, mission accomplishment or effectiveness, and also morale or welfare of the troops. So anything that's really inherent to a commander's responsibilities, they will generally grant deference as long as it's not being used to abuse authority or be arbitrary and capricious.

So for civilians who come on installation, they may have lower speech rights simply by virtue of being on a military installation. If their speech that they want to engage in is going to jeopardize good order and discipline or mission accomplishment on that installation.

Now, when we talk about things like political speech, for military members, partisan's political activity is highly restricted. This is from the Department of Defense Instructions, as well as in the Air Force or specific Air Force Instruction 51-508. And it explains some things you can and cannot do. For military civilians or DoD employees, they are also prohibited from certain activities, particularly partisan political activities, under the Hatch Act. I think one part of the question you're asking is, you know, when you have certain speech that might be divisive or have a negative impact on your workplace, even for civilians, they are restricted if they have those impacts. We have to follow certain regulations and employee protections. But under the Hatch Act, certain political speech is not going to be allowed in the workplace. It's more lenient than for military members, but for civilians, there are still restrictions.

This general political movement, and can you display certain things in your workplace as a federal employee? Well, the Office of Special Counsel released a memo, an opinion, as to whether it was a political activity or not. I think it's really important to read that memo because when you read it, you have to understand under the Hatch Act for civilian employees, political activities are only those that are tied to candidates for office or affiliate with a political party. So really, for a civilian, the only thing that's considered "political" is partisan activities. They came out and they said no, that was allowed for a civilian employee if they wanted to display certain types of things in their offices. But if you look at the restrictions on military member, our definitions of a political activity are really partisan and nonpartisan. But general political activity for a military member would still not be appropriate if they're in uniform or on duty.

So you have a situation where the definitions apply to civilians and military members who may work in the same work center are different, and that means that their restrictions are different. And so you could have people with two different rules being applied in the same workplace, allowed to do two different things.

BUMPER STICKERS

MAJ HANRAHAN:

And I'm sure that could lead to some challenging issues there and dealing with personnel and in understanding the laws and all that. But wow I mean, you packed a lot of great information there.

Maybe to kind of piggyback off of what you talked about between partisan or nonpartisan activity. I know there's lots of other examples out there. Some that come to mind that I've heard through the years are things such as bumper stickers, right, on vehicles as people are coming in or what they can put on their vehicles, more recently, flags on installations. Can you speak to maybe one or both of those are those issues?

MAJ SERRANO:

Yeah. Okay. So everyone loves bumper stickers, probably except for the JAGs, because the people ask us about these all the time. So AFI 51-508 is our guide in the Air Force to certain political activities, prohibited activities. This all stems, though, from a DoD Directive, which is 1344.10.

But when we look at something like political speech by a military member, can they engage in, let's say, expressing a personal political opinion? They may. And they can do that. They can also establish that through a bumper sticker on their vehicle. Normal size, though. AFI 51-508 is clear, is normal sized bumper stickers. So you can definitely express that in the workplace, you know, by bringing your vehicle on base, you can have your personal political opinion established on a bumper sticker.

There are some limits, though, when you come onto the installation that an installation commander has authority under the law to restrict certain expressions. And so if a commander were to find that a certain bumper sticker was vulgar or obscene or whatever was being messaged on that bumper sticker was contrary to good or discipline, was causing Airmen to throw fisticuffs in the parking lot, a commander would have the authority to have that vehicle either removed from the installation or the member or civilian who own the vehicle to remove the offending sticker.

Now, that gets into an issue about content neutral restrictions, other, you know, content based or viewpoint discrimination. Those do trigger First Amendment issues. So any time we have something, a commander should first consider, is there a legitimate military interest in restricting this expression? And also, is there a way to do this where it's content neutral? A great example is the recent flag ban that came down from the DoD. We had several issues where people across the DoD complained on installations that certain flags were either offensive or they were causing issues. A lot of this got kickstarted

by the Marine Corps, who they were going to restrict public display of the Confederate battle flag from all Marine Corps installations. And so a lot of people will wonder, how can you do that?

Well, the installation commanders have this authority, and they can restrict these things. And the DoD's ultimate guide that came out was this content neutral restriction. We were going to prohibit ALL flags, except for official flags. So the U.S. flag, official flags of the states, official flags of units, those can be flown on base in a public area or publicly displayed, but no other flags can. So ultimately, the way they decided it, and the way it's been enforced, is that we will not engage in either viewpoint or content-based discrimination. We're not going to pick and choose which flags are okay. We just established that generally, except for these official flags, no flags can be established, and they can do that because of the legitimate military interest and ensuring good or discipline and mission accomplished on these bases.

But that does restrict people's First Amendment rights on installation, including civilians that come on installations. So that's how that went down. And that kind of, these cases that we've talked about, you know, particularly Greer versus Spock, an installation commander has a lot of authority to restrict free expression on the base, if it's going to jeopardize the military mission.

PRESIDENT & COMMANDER IN CHIEF

MAJ HANRAHAN:

Thanks for that great explanation. I know it can be a little tricky and there's different rules you have to look to and depends on what services and what the installation commander has done.

Kind of part and parcel to that, I'd like to just briefly talk about the U.S. president in the two hats that the president can wear, one as a politician and one as Commander in Chief. Could you maybe elaborate on that a little bit, especially as it goes into whether certain areas considered to be a public forum or not?

MAJ SERRANO:

Yeah. So when the president or any elected politician, let's assume you know, either members of Congress or the executive, if they were to come to a military base, we know that often they come to do it in their official hat. And this really ties into this idea of the military not being a political entity, right? The military is often and we worked very hard to ensure we are non-political, that we are apolitical, that we do not show a preference for any type of political party or candidate. Members can have their own personal opinions, but as an organization, we want to be apolitical and show, to show that we can be entrusted with the nation's defense, regardless of who's in charge.

Now, when you have someone who is both in an official capacity, but could also be a candidate for office, it does get a little bit tricky. However, we look at it, whether or not they're acting in official capacity when they come to installation. Like I said earlier, we are considered a nonpublic forum on an installation. And so we generally do not allow, as a rule, any type of partisan political activity or campaigning—all installations.

Now, if someone comes and they're an official, official government, you know, if part of the official government, the United States. So if you had a congresswoman come to your base for an official visit, that would generally be okay. Even though we know this person may be a political candidate for office, so long as the visit is in their official hat, then they're okay. They can come. They have responsibilities for budgeting, paying for, you know, helping on the appropriations for the government to pay for the military operations, things like that. They also will have official duties to ensure morale of the troops and ensuring operations in their state. They're aware of anything big as a representative for that location.

POTUS is similar. When the President of United States comes and visits in their Commander in Chief hat to tour their troops, make sure things are going well, because ultimately, they're responsible for the military. That is

totally fine. It's not a political visit, and we don't have any issues.

Now, where it gets dicey is if a political or a nonpolitical visit, an official visit, somehow it becomes political. Then we get really nervous as military members, because we know that we have to be apolitical. We know that our rules and the laws prohibit us from participating in certain partisan political activities while we are on duty or in uniform. It's a big one.

And so when we have the situations, we definitely jeopardize the military's ability to remain a nonpublic forum on the installation. Because if we were to invite political campaign activity, well, then we get to this issue with viewpoint discrimination, where we can't pick and choose which politician you like. And so if you were to invite, let's say, a Democrat in the gate to their opponent who may be Republican, but not only that opponent, another opponent for maybe a fringe party or a smaller party would also have the right to come on because we get in trouble here. Now they're picking and choosing sides. And so generally that's why we have these content neutral restrictions where we say no partisan political campaign speeches on military bases, so we avoid that issue.

SOCIAL MEDIA

MAJ HANRAHAN:

So kind of moving to a topic that I think it's a lot of press and is probably something right the forefront of most of our listeners minds is social media, right? We're all on social media in some way or another. Could you maybe offer just your insights that on the landscape there from a First Amendment standpoint with social media with folks that are within the military?

MAJ SERRANO:

So when I talk to the commanders at the Senior Officer Legal Orientation about the First Amendment, inevitably they always want to talk about social media, because it is kind of this new area for a lot of them where

First Amendment rights are suddenly kind of in conflict, I will say, with the expectations of military members and our rules.

So all of these rules on military expression, political expression, they apply in social media. So an Airman who is posting during election season, they may post about their personal political opinion online. However, because we have certain rules about partisan political activities in uniform or if they would interfere with their duties, they can't do that at the workplace. And if they're social media or to give the impression that they were doing this in any official capacity, or if they were doing this and somehow they appear that the DoD or the Air Force is sanctioning their same opinion, that's problematic.

So any time a military member is on social media and they want to publish something or post something related, they should be using a disclaimer especially, especially when their social media platform identifies them either as a military member or, you know, gives the location where they're stationed. They need to have a disclaimer for this post to make it clear that this is a personal political opinion. Then they'll probably be okay. That's a big thing.

Another thing on social media is that we are also prohibited from soliciting votes for partisan candidates, and we also cannot fundraise for partisan political organizations. So when you see during a big election, everyone on social media is shooting out these candidates fundraising platforms, the link to donate, or "Hey, I'm going to vote for so and so. You should vote for them too"—they're crossing a line if they're a military member, because they're prohibited from doing that. They can't do that even if they're not in uniform or not at work, because they're prohibited from certain political activities, and those are some of them that are, particularly partisan political activities, and those are those covered by the AFI. So that is problematic on social media.

For a lot of commanders, they also are concerned about activities that are on social media where the member is saying something either disparaging of an elected official or causing folks out there to think that the military member is doing something that is service discrediting. Got to keep in mind that for military officers specifically, Article 88 of the Uniform Code of Military Justice applies to officer speech where you cannot use contemptuous words against the president, the vice president, certain secretaries or even the governor of the state that you're stationed in.

It also applies to speech that is contemptuous of Congress. But as these issues come up particularly with things like COVID restrictions in certain states, military members wanted to voice their opinions about the election, maybe about post-election issues, but they still have to be careful. Now, Article 88 specifically applies to commissioned officers, but enlisted members are also still going to be scrutinized in whether or not their speech is discrediting to the service or jeopardize the good or discipline.

A famous case from a few years back came out of the Marine Corps, where a member had started a political Facebook page and said he wasn't going to follow orders of the Commander in Chief, things like that, and use some contemptuous language. Even though this member was not a commissioned officer, since that caused questions as to his ability to follow orders, right, maintain good order and discipline, and brought discredit to the Service, that member was punished.

That is something that military members, because we often get these requests to review certain complaints, and commanders are going to have to police what people do because our rules require it. And so just because we're on social media does not mean that we suddenly have this free platform to say whatever we want. We still have to follow our rules. There's a lot of things military members can say under the First Amendment that are fine. You know, you having a valid

criticism of a policy or even of an elected official. But they have to be careful because the lines that they cross when they get maybe too passionate about that could also be a line they cross where they may be subject to discipline or administrative action.

Social media is kind of this Wild West in a lot of ways, and people forget that they still represent something bigger than themselves. And they got to keep that in mind and stay on the right side of the rules.

MAJ HANRAHAN:

Major Serrano I think you did an excellent job there talking about those fundamental principles. And I'm sure, you know, you get into very specific issues. You know, if you're a commander, you'll want to work with your legal team on that because every situation is different, right? It can be very fact specific there.

[closing music]

CAPT HEDDEN:

That concludes part one of this interview. Please stay tuned for part two coming out in our next episode. Til next time.

Thank you for listening to another episode of The Air Force Judge Advocate General's School Podcast. You can find this episode, transcription and show notes along with others at JAG Reporter dot A F dot mil slash podcasts. You can also find us and follow or subscribe to our show on Apple Podcasts and Spotify.

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GLOSSARY

- **AFI:** Air Force Instruction
- **AFJAGS:** Air Force Judge Advocate General's School
- **JAG:** judge advocate general
- **POTUS:** President of the United States